IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KELSEY P. GEORGE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12984 Trial Court No. 3GL-16-00041 CI MEMORANDUM OPINION No. 6874 — June 3, 2020

Appeal from the Superior Court, Third Judicial District, Glennallen, Daniel Schally, Judge.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge HARBISON.

Kelsey P. George appeals the dismissal of his application for post-conviction relief. The superior court dismissed George's application after his post-

conviction relief attorney filed a certificate of no arguable merit under Alaska Criminal Rule 35.1(e)(2)(C).

On appeal, George argues that his attorney's certificate was deficient and that the superior court erred in accepting it. The State concedes error. We have independently reviewed the record, and we conclude that the State's concession is well founded.[1] We therefore vacate the dismissal of George's application for post-conviction relief and remand for further proceedings.

Underlying facts

In 2011, following a jury trial, George was convicted of four counts of first-degree sexual abuse of a minor, one count of attempted first-degree sexual abuse of a minor, and three counts of second-degree sexual abuse of a minor.

George appealed two of his convictions to this Court.[2] He challenged his attempted first-degree sexual abuse of a minor conviction, arguing that a state trooper was erroneously allowed to testify that he believed George's confession was truthful. He also challenged one of his first-degree sexual abuse of a minor convictions, arguing that there was insufficient evidence to support the jury's verdict. We affirmed both convictions.[3]

George then filed a petition for hearing in the supreme court, renewing his argument that there was insufficient evidence to support the jury's verdict for one of his

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[1] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess whether a concession of error "is supported by the record on appeal and has legal foundation").

[2] *George v. State*, 2014 WL 2937874, at *1 (Alaska App. June 25, 2014) (unpublished), *rev'd in part*, 362 P.3d 1026 (Alaska 2015).

[3] *Id.* at *4-5.

first-degree sexual abuse of a minor convictions.[4] The supreme court agreed with George and reversed that conviction.[5] This left George convicted of three counts of first-degree sexual abuse of a minor, one count of attempted first-degree sexual abuse of a minor, and three counts of second-degree sexual abuse of a minor.[6]

In 2016, George filed a *pro se* application for post-conviction relief, alleging that a state trooper "committed perjury under oath as witness for the prosecution," that the state troopers "took advantage of [his] disability (FAS) during the investigation," and that a state trooper pressured one of his victims to change her answer during the investigation. The superior court appointed an attorney to assist George in litigating his application.

Four months after George's appointed attorney entered an appearance, the attorney filed a certificate of no arguable merit pursuant to Alaska Criminal Rule 35.1(e)(2)(C). The attorney did not serve this certificate on George, although she stated in the certificate that she wrote him a letter explaining his right to appeal. She also did not obtain an affidavit from George's trial or appellate counsel, although she did file her own affidavit, in which she stated that she had corresponded with George's trial attorney.

After receiving the certificate of no arguable merit, the superior court issued an order stating that it had reviewed the certificate and agreed with George's post-conviction attorney that George's application had no arguable merit. In the order, the court announced its intent to dismiss the application for post-conviction relief. The court

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[4] *George v. State*, 362 P.3d 1026, 1027, 1030 (Alaska 2015).

[5] *Id.* at 1027, 1030-33.

[6] We note that the amended judgment in George's case, dated March 7, 2016, contains a clerical error. Count 1 lists a conviction for sexual abuse of a minor instead of *attempted* sexual abuse of a minor. On remand the listing for Count 1 on the judgment should be corrected.

mailed a copy of its order to George personally, but did not inform George of his right to file a response. Less than a month later, the court, noting that no response had been filed, dismissed George's application for post-conviction relief.

Why we vacate the dismissal of George's application for post-conviction relief

On appeal, the State and George (now represented by new counsel) identify multiple deficiencies in the certificate of no arguable merit and the superior court's orders and therefore agree that it was error for the superior court to dismiss George's application for post-conviction relief. In particular, the parties agree that George's attorney used the wrong standard in assessing his claims, that she did not provide a sufficient explanation of why the application could not be amended to raise colorable claims, and that George was not given an adequate opportunity to respond to the certificate of no arguable merit. As we noted above, we have independently reviewed the record, and we agree with the parties that these deficiencies require us to vacate the dismissal of George's application.

A certificate of no arguable merit filed under Rule 35.1(e)(2)(C) must include a statement that counsel "has determined that the claims presented in the application have no arguable merit and that the applicant has no other colorable claims for post-conviction relief." But we have explained that "there is a crucial distinction between a claim that has 'no merit' in the sense that the court will likely rule against the claim, and a claim that is 'frivolous,' in the sense that no reasonable argument can be made in favor of the claim."[7] It is the latter analysis — *i.e.*, a determination of whether

[7] *Vizcarra-Medina v. State*, 195 P.3d 1095, 1099 (Alaska App. 2008).

a claim is frivolous — that must be used when determining whether there is "no arguable merit" for purposes of a certificate filed under Rule 35.1(e)(2)(C).[8]

The affidavit filed by George's attorney reflects that she rejected certain of George's claims because she thought that they were not likely to be successful rather than because they were frivolous. For example, the attorney stated that she "did not believe . . . that a motion to sever would have been successful." And the attorney declined to pursue an ineffective assistance claim against trial counsel for failing to file a motion to suppress George's statements, even though she conceded that a zealous attorney would have filed the motion.[9]

These examples demonstrate that George's post-conviction attorney evaluated George's potential claims based on whether the claim was likely to succeed rather than on "whether there was a colorable argument that a zealous advocate could advance in support of the claim."[10] In other words, the attorney applied the wrong standard when she assessed George's claims. Because the certificate of no arguable merit does not reflect that George's attorney concluded that all possible claims would be frivolous rather than simply meritless, the certificate was deficient and it was error to dismiss George's application based on it.

It was also error to dismiss George's application because the certificate of no arguable merit does not adequately explain why the application could not be amended to assert a colorable claim. We acknowledge that the affidavit filed by George's attorney

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[8] *Id*. at 1100.

[9] The attorney also concluded that the admission of George's statements at trial was not prejudicial to him. But we question this conclusion, particularly in light of our discussion in George's direct appeal of the likely impact of George's statements on the jury's verdict. *See George v. State*, 2014 WL 2937874 (Alaska App. June 25, 2014).

[10] *Johnson v. State*, 77 P.3d 11, 13 (Alaska App. 2003).

explained her reasons for rejecting the claims set out by George's original application, and it also set out three additional claims that the attorney considered. But the attorney stated in her affidavit that she did not thoroughly review whether George's cognitive disabilities made his statements to the troopers involuntary. Moreover, all of the claims that George's attorney reviewed related to pretrial issues. The attorney did not explain whether she reviewed the trial and appellate records or, if she did, why she rejected any claims related to these phases of the case.

Finally, we note that, under Rule 35.1(f)(2), when a court intends to dismiss an application pursuant to a certificate of no arguable merit, it must first give the applicant the opportunity to respond.[11] And in order for an applicant to have a meaningful opportunity to respond, the applicant must be served with the no-merit certificate and with the court's order explaining the reasons for its intended dismissal.[12]

Despite the clear requirements of Rule 35.2(f)(2), George's post-conviction attorney did not serve George with the certificate of no arguable merit. And although the court served George with notice of its intent to dismiss, it did not inform him of his right to file a response, nor did it provide a deadline for any response.

For these reasons, we agree with the parties that it was error for the superior court to dismiss George's application for post-conviction relief.

Conclusion

We VACATE the superior court's order dismissing George's post-conviction relief application, and we reinstate the application for post-conviction relief.

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[11] *Griffin v. State*, 18 P.3d 71, 76 (Alaska App. 2001).

[12] *Id.*

This case is REMANDED to the superior court for further proceedings consistent with this opinion. Additionally, on remand, the superior court shall correct the clerical error on the judgment that we noted in footnote 6 of this opinion.